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In The

Supreme Court of the United States

October Term, 1989

UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GEORGE R. TRIPLETT, ET AL.,

Respondents.

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,

Petitioner,

v.

GEORGE R. TRIPLETT, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS

Page

STATEMENT 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

Judicial Deference 4

The Walters Decision 5

Government Interest in Regulating Fees 6

Private Interest in Retaining Counsel 8

Probability of Error 12

CONCLUSION 33

TABLE OF AUTHORITIES

Page

Anderson v. Sheppard, 856 F.2d 741 (6th Cir. 1988) 31

Armstrong v. Manzo, 380 U.S. 545 (1965) 2

Belcher v. Beth-Elkhorn Corp., 6 BLR 1-1180 (1984) 24

Betts v. Brady, 316 U.S. 455 (1942) 25

Brooks v. Small Claims Court, 8 Cal. 3d 661, 105 Cal. Rptr. 785, 504 P.2d 1249 (1973) (in bank) 30

Brotherhood of R. R. Trainmen v. Virginia, ex rel. Virginia State Bar, 377 U.S. 1 (1964) 24

Brown v. Air Pollution Control Bd., 37 Ill.2d 450, 227 N.E.2d 754 (1967) 31

Caplin & Drysdale, Chartered v. United States, 109 S.Ct. 2646 (1989) 8

Clinchfield Coal Co. v. Cox, 611 F.2d 47 (4th Cir. 1979) 19

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82 (W.Va. 1988) ..... *passim*

Foster v. Walus, 81 Idaho 452, 347 P.2d 120 (1959) 30

Gideon v. Wainwright, 372 U.S. 335 (1963) 26

Goldberg v. Kelly, 397 U.S. 254 (1970) 2, 9, 31

Gray v. New England Tel. & Tel. Co., 792 F.2d 251 (1st Cir. 1986) 30

In Re Gault, 387 U.S. 1 (1967) 21

Indiana Planned Parenthood v. Pearson, 716 F.2d 1127 (7th Cir. 1983) 30

TABLE OF AUTHORITIES – Continued

Page

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 2, 30

Lincovich v. Secretary of HEW, 403 F.Supp. 1307 (E.D.Pa. 1975) 23

Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982) 30

Mathews v. Eldridge, 424 U.S. 319 (1976) 1, 7, 12, 13

Mendoza v. Small Claims Court, 49 Cal.2d 668, 321 P.2d 9 (1958) (in bank) 30

Mooney v. Eastern Energy Associated Coal Corp., 326 S.E.2d 427 (W.Va. 1984) 9

Mosely v. St. Louis SW Ry., 634 F.2d 942 (5th Cir. 1981) 31

Mullins Coal Co. v. Director, OWCP, 484 U.S. 135 (1987) 5, 16, 22, 25

Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir. 1980) 8, 30

Powell v. Alabama, 287 U.S. 45 (1932) 2, 8, 29

Prudential Ins. Co. v. Small Claims Court, 76 Cal.App.2d 379, 173 P.2d 38 (Cal. Dist. Ct. App. 1946) 30

Randolph v. United States, 274 F.Supp. 200 (M.D.N.C. 1967), aff'd., 389 U.S. 570 (1968) 2, 13

Rex Investigative & Patrol Agency, Inc., 329 F.Supp. 696 (E.D. N.Y. 1971) 31

Scanlan v. Secretary of HEW, 428 F.Supp. 313 (E.D. Pa. 1976) 23

Shapell v. Director, OWCP, 7 BLR 1-304 (1984) 24

TABLE OF AUTHORITIES – Continued

Page

Simon v. Lieberman, 193 Neb. 321, 226 N.W.2d 781 (1975) 30

Stearns v. VFW, 394 F.Supp. 138 (D.D.C. 1975) 14

United Mine Workers v. Illinois Bar Assn., 389 U.S. 217 (1967) 9

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 12, 16

Walters v. National Assn. of Radiation Survivors, 473 U.S. 305 (1985) ..... *passim*

Watson v. HEW, 562 F.2d 386 (6th Cir. 1977) 5

CONSTITUTIONS, STATUTES & REGULATIONS

U.S. Const.: Amend. V
Due Process Clause ..... *passim*

20 CFR: Section 718.1 17

722.152(b) 10

725.1 17

725.201 17

725.360 18

725.363 5

725.367 19

725.409(a)(3) 15

725.409(b) 15

TABLE OF AUTHORITIES – Continued

Page

725.410(c) 15, 22

725.419 15

725.457 23

725.458 23

725.459 23

725.479 15

725.481 ..... 15, 23

725.482 ..... 15, 23

725.533 ..... 10, 11

725.536 10

725.539 11

725.608 19

801.103 23

802.202 5

802.205 15

802.410 23

30 U.S.C. § 901(a) 7, 10, 17

§ 902(f)(1)(A) 11

§ 922(b) 10

§ 932 ..... 10, 19

33 U.S.C. § 928(a) 19

38 U.S.C. § 19.124 15

TABLE OF AUTHORITIES – Continued

Page

38 U.S.C. § 19.129 15

38 U.S.C. § 3402 14

W.Va. Code § 23-4-1, 23-4-6a 10

W.Va. Code § 23-4-2 9

W.Va. Code of Professional Responsibility DR 2-106 7

W. Va. Rules of Professional Conduct, Rule 1.5 7

MISCELLANEOUS

Black Lung Benefits: Hearing Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor, 92nd Cong., 1st Sess. (1971) 11, 21

Black Lung Legislation, 1971-72: Hearing Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess. (1971, 1972) 10

Cohaney, *Labor Force Status of Vietnam-Era Veterans* 13 (Feb. 1987) 18

Delays in Processing and Adjudicating Black Lung Claims: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 109 (1985) 17, 20, 28

Falk, *Counseling the Coal Miner Suffering from Respiratory Disease*, 83 W.Va.L.Rev. 833 (1981) 22

Goldhammer, *Legal Fees in Nonbusiness Administrative Claims*, 26 Hastings L.J. 1127 (1975) 23

TABLE OF AUTHORITIES – Continued

Page

Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. of Education and Labor, 99th Cong., 1st Sess. (1985) 13, 16, 17, 18, 19

Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va.L.Rev. 677 (1983) 5, 13, 19

Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 100th Cong., 2d Sess. (1988) ... *passim*

Popkin, *The Effect of Representation in Nonadversary Proceedings – A Study of Three Disability Programs*, 62 Cornell L.Rev. 989 (1977) 9, 13, 14

Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W.Va.L.Rev. 665 (1989) 7, 27

Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stanford L.Rev. 905 (1975) 14

S. Rep. No. 743, reprinted in 1972 U.S. Code Cong. and Admin. News 12

Selinger, *What are Lawyers Good for?: The Radiation Survivors Case, Non-Adversarial Procedures and Lay Advocates*, 13 The J. of the Legal Profession 123 (1988) 21

Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W.Va. 763 (1981) 19, 21

TABLE OF AUTHORITIES – Continued

Page

U.S. Department of Labor, *Employment Standards Administration, A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* (1983).....16, 17

Veterans Administration, *Selected Compensation & Pension Data by State of Residence, Fiscal Year 1987*, page 3 18

STATEMENT

The opinion of the Supreme Court of Appeals of West Virginia, which appears as an appendix to the Petition for Writ of Certiorari filed by the Department of Labor, is incorporated by reference.

This opinion was originally published as *Committee on Legal Ethics v. Triplett*, 376 S.E.2d 818 (W.Va. 1988), and was subsequently republished, as corrected, at 378 S.E.2d 82.

SUMMARY OF ARGUMENT

The Supreme Court of Appeals of West Virginia correctly applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), in concluding that the rules and regulations of the black lung benefit program, as applied, impermissibly restrict the due process rights of black lung claimants to retain legal counsel to assist them in black lung proceedings. Whatever interest, if any, the government may have in perpetuating the inadequate levels of compensation for attorneys and delays in fee payment which have discouraged many attorneys from handling black lung claims is markedly outweighed by the claimants' interest in obtaining the black lung benefits to which they are entitled, and the probability of an erroneous denial of such benefits when claimants are forced to proceed *pro se*.

Black lung claimants have a significant property interest in obtaining and retaining black lung benefits, which frequently spell the difference between a decent or substandard quality of life for miners and their families.

In terms of need, black lung claimants more closely resemble the welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970), then the disabled veterans in *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985)

As the Department of Labor notes at page 20 of its brief, "[t]he touchstone of procedural due process is 'fundamental fairness.' " *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981), in providing "an opportunity '[to be heard] at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)."

This Court has long recognized that access to counsel is an important element of due process in both criminal and civil proceedings. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 68-9 (1932); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). Although there may be some administrative proceedings which are so simple, informal and nonadversarial in nature that due process does not require that a claimant be allowed to retain legal counsel if he so desires, see *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985) (VA disability benefits), *Randolph v. United States*, 274 F.Supp. 200 (M.D. N.C. 1967) (per curiam), *aff'd per curiam*, 389 U.S. 570 (1968) (social security benefits), black lung proceedings, as a general rule, are not among them. It is fundamentally unfair to compel a claimant with little schooling and limited financial resources to thread his way through a Byzantine labyrinth of rules, regulations and statutes, and to confront, *pro se*, powerful adversaries employing skilled counsel, in order to obtain the benefits he needs in order to ensure a decent standard of living for himself and his family.

In case at bar is readily distinguishable from *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985), in which this Court rejected a due process challenge to the statute which limits the attorney's fee available in Veterans Administration [VA] proceedings to $10.00.

In VA proceedings, claimants encounter no "opponent" other than a government agency which is required by law to assist them in pursuing their claims. Proceedings are informal and nonadversarial. Most cases are relatively simple, and claimants enjoy the services of various veterans organizations which provide competent assistance, free of charge, to anyone who desires their help in obtaining disability benefits. Under this "user-friendly" system, over half of all VA claims are approved, and claimants with counsel fare only slightly better than veterans represented by service organizations, or proceeding *pro se*.

In black lung benefits proceedings, however, as the lower court correctly noted, claimants encounter a complex and "viciously adversarial" system in which elderly, ailing and unschooled miners and their survivors confront coal mine operators, insurance companies and the government trust fund, all of whom employ skilled counsel to represent them. In many cases, the claimants proceed *pro se*, because the delays and inadequate compensation typical of the black lung program discourage most attorneys from taking such cases. Moreover, during the brief 20-year history of the black lung program, no supporting infrastructure comparable to veterans service organizations has arisen to assist miners in pursuing their claims. In striking contrast to claimants' "success ratio" in VA proceedings, the majority of black

lung claims are denied, and those who are able to retain counsel fare substantially better than those who proceed *pro se*.

ARGUMENT

Judicial Deference

The Department of Labor begins its attack on the lower court's opinion by asserting that "the Court below starkly misconceived its proper role by failing to pay the necessary deference owed to an Act of Congress." Petition at 12. In support of this argument, the petitioner then quotes the following language from the Court's opinion in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 319 (1985): "Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that [the judiciary] is called upon to perform, and we begin our analysis here with no less deference than we customarily pay to the duly enacted and carefully considered decision of a co-equal and representative branch of our government."

However, the case at bar, unlike *Walters*, does not involve a claim of facial invalidity. The lower court in this case held that the black lung fee system was unconstitutional as applied, *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 89 (W.Va. 1988), but the *Walters* Court did not "determine the merits of the appellees' individual 'as applied' claims." 473 U.S. at 337 (O'Conner, J., concurring).

It is difficult to believe that when Congress created the federal black lung program, it intended to create a system flawed by inordinate delays in paying attorney fees, or that resulted in inadequate compensation for claimants' attorneys. There is certainly no evidence that Congress intended to prevent claimants from obtaining counsel. In fact, such representation is expressly contemplated in the black lung regulations. *See* 20 CFR 725.363(a), 802.202(a), (d) and (e).

It should also be noted that the *Walters* court may have exercised unusual deference in reviewing the VA fee system because "the statute in question . . . [had] been on the books for over 120 years." 473 U.S. at 319. The federal black lung program, on the other hand, has only been in existence for 20 years, and during that brief period of time, it has undergone numerous and extensive revisions and amendments. *See generally Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987); Lapato, *The Federal Black Lung Program: A 1983 Primer*, 85 W.VA.L.Rev. 677 (1983). More specifically, regulations concerning attorney fees in black lung proceedings did not go into effect until August 31, 1972. *Watson v. HEW*, 562 F.2d 386, 388 (6th Cir. 1977).

The Walters Decision

In *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), this Court rejected a due process challenge to the statute which limits the attorney's fee available in Veterans Administration [VA] proceedings to $10.00. Although the petitioners argue that the *Walters* decision compels a similar result in the present dispute, the two cases are so markedly different as to

justify different conclusions concerning the constitutionality of their respective fee systems.[1]

The important thing about the *Walters* opinion for purposes of resolving the present dispute is the reasoning used by the Court in reaching its decision, and not the result itself. Under *Walters*, the lower court was required to balance a number of factors, including the government's interest in retaining the present fee system, the claimants' interest in obtaining black lung benefits, and the danger of erroneous denials of claims if counsel were not available to assist claimants in obtaining benefits. As noted below, the Supreme Court of Appeals of West Virginia did not err in applying this test.

Government Interest in Regulating Fees

The government's interest in requiring approval of attorney fees in black lung cases is ostensibly to prevent responsible operators and the black lung trust fund from being overcharged. These parties are normally represented by counsel, however, and are quite capable of using black lung proceedings to protect their interests.

The government's interest in prohibiting direct fee agreements between claimants and their attorneys is allegedly to prevent overreaching by counsel. Unfortunately, this scheme which was intended to prevent the

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[1] Among other differences, as the Department of Labor repeatedly observes in its brief, "the black lung program is not intended to operate as informally as the VA benefits system at issue in *Walters*." Brief for the Federal Petitioner at 14, 35.

needless depletion of benefits frequently results in claimants receiving no benefits at all, even though "[t]he plain language of the Black Lung Benefits Act states that its single purpose is to provide adequate compensation on account of total disability or death due to pneumoconiosis." Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W.Va.L.Rev. 665, 671 (1989). *See* 30 U.S.C. § 901(a).

Whatever interest the government may have in protecting claimants from overreaching and excessive fees is adequately protected by the bar's own normative rules. Between 1970 and 1989, West Virginia operated under a code of professional conduct modeled on the ABA Model Code. Effective January 1, 1989, the state adopted the ABA Model Rules of Professional Conduct. Under both sets of rules, ample provision has been made to regulate overreaching and the charging of excessive fees. *See West Virginia Code of Professional Responsibility*, DR 2-106; *W.Va. Rules of Professional Conduct*, Rule 1.5. Moreover, under the black lung program, attorney fees are *not* paid by claimants – they come from responsible operators or the black lung trust fund.

The Department of Labor also asserts that removing the present disincentives to attorney participation in black lung proceedings may entail some expense on the part of the government. While it may be relevant, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

Of course, what the respondent really objects to in this case is not the required agency approval of attorney fees, or the prohibition against direct fee agreements with claimants, *per se*, but the inordinate delays in payment of attorney fees, and inadequate compensation for attorney fees, which have plagued the system for many years. It is doubtful that the government has any interest in perpetuating these operational flaws, which prevent many needy and deserving claimants from obtaining the benefits to which they are entitled.

Private Interest in Retaining Counsel

Black lung claimants and recipients have important property interests in receiving the statutory benefits to which they are entitled.[2]

Fee limitations also impair enjoyment of an important liberty interest – the right of an individual to consult with attorneys on matters affecting his legal rights. *See Powell v. Alabama*, 287 U.S. 45, 68-9 (1932); *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980), and may infringe First Amendment rights of free speech, assembly and

[2] The Department of Labor concedes in its brief that at least one of Mr. Triplett's clients had a property interest sufficient to invoke the protections of due process. Brief for the Federal Petitioner at 20-21. The department also assumes, for purposes of its brief, that Mr. Triplett has standing to raise the due process rights of his clients. *Id.* at 20, n. 7. *Cf. Caplin & Drysdale, Chartered v. United States*, 109 S.Ct. 2646, 2651 n. 3 (1989).

petition, as well. *Cf. United Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 221 (1967).

In addition to impairing the ability of claimants to obtain much needed benefits, excluding lawyers from the system may create an appearance of injustice that detracts from the perceived legitimacy of the claims process. See Popkins, *The Effect of Representation in Nonadversary Proceedings – A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1038 (1977).

In terms of need, black lung claimants, as a group, more closely resemble the welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970), than the disabled veterans in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985).

Under West Virginia law, a miner will not be able to recover compensation for pneumoconiosis from his employer in a civil tort action. The standard for recovery established by W.Va. Code § 23-4-2 for suits against employers is simply too difficult to meet. *See generally Mooney v. Eastern Energy Associated Coal Corp.*, 326 S.E.2d 427, 433 & n. 2 (W.Va. 1984) (Miller, J., dissenting). Thus, in most cases, a claimant's only hope of obtaining compensation for his black lung related disability lies in some form of state or federal entitlement program.

> The approval or denial of black lung benefits – the determination of disability – for a miner in many instances constitutes a matter of life and death. It very often determines whether a miner and survivors will be able to maintain a halfway decent standard of living. Black lung benefits can mean the difference between adequate or substandard housing; sufficient diet or

undernourishment; and minimal medical care or no medical care for a miner and his family.

Black Lung Legislation, 1971-72: Hearings Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess. 2 (1971, 1972) (Statement of Sen. Jennings Randolph) [Black Lung Legislation].

Many recipients do not have other sources of income,[3] and even when other sources are available, they frequently result in a reduction of benefits under the black lung program. Under 30 U.S.C. § 922(b), benefit payments "shall be reduced . . . by an amount equal to any payment received . . . under the workmen's compensation, unemployment compensation, or disability insurance laws of [a miner's] state on account of [his] disability . . . due to pneumoconiosis, and the amount by which such payments would be reduced on account of excess earning . . . "[4] See also 30 U.S.C. § 932(g), 20 CFR §§ 725.533(a)(1), 725.536. Black lung benefits may also be reduced because of "[a]ny compensation or benefits received under or pursuant to any federal law

[3] The federal black lung program was created in 1969 largely because "few states provide[d] benefits for death or disability due to this disease [pneumoconiosis] to coal miners or their surviving dependents." 30 U.S.C. § 901(a). Twenty (20) years later the Secretary of Labor has yet to find that any state, including West Virginia, has a workers' compensation system which "provides adequate coverage for pneumoconiosis." 20 CFR § 722.152(b).

[4] Unlike many states, West Virginia does provide workers' compensation benefits for the victims of occupational pneumoconiosis. *See, e.g.*, W.Va. Code §§ 23-4-1, 23-4-6a.

. . . because of death or partial or total disability due to pneumoconiosis." 20 CFR § 725.533(a)(2). In cases where multiple reductions apply, a claimant's black lung benefits can be, and often are, reduced to nothing. *See* 20 CFR § 725.539.

Black lung benefits are awarded to former miners who are unable to do coal mining jobs or comparable work. *See* 30 U.S.C. § 902(f)(1)(A). On its face, this is a less stringent test of disability than in *Mathews*, where the benefits were available only for inability to do any substantial gainful work in the national economy. 424 U.S. at 336.[5]

As a practical matter, however, coal miners who are unable to continue mining because of black lung are unlikely to find other gainful employment. In addition to suffering from handicaps of age and physical impairment, they tend to live in rural, non-industrial areas of the country where there are few jobs outside of the coal industry,[6] and lack the skills and training to pursue other occupations. Black Lung Legislation at ___, (Statement of Sen. Jennings Randolph), at ___ (Statement of Sen. Richard S. Schweiker), at 117 (Statement of Donald Rasmussen, M.D.); *Black Lung Benefits: Hearing Before the*

[5] Although it should be noted that the Social Security disability program does not require any showing that the claimant's disability is job-related, while the black lung program requires claimants to demonstrate that their disability stems from coal-related employment.

[6] "[B]etter than 80 percent of the Nation's coal miners live in Appalachia." Black Lung Legislation at 330 (Statement of Donald W. Whitehead, Federal Co-chairman, Appalachian Regional Commission).

Gen. Subcomm. on Labor of the House Comm. on Education and Labor, 92nd Cong., 1st Sess. 85 (1971) (Statement of James Haviland, Esquire, black lung attorney) [Black Lung Benefits].

When the Black Lung Act was first enacted, the Social Security Administration used the same eligibility standard discussed in *Mathews.* "This classic standard applied by the Social Security Administration" was quickly abandoned by Congress because "it work[ed] an obvious inequity . . . when applied to coal miners with black lung." Black Lung Legislation at ___ (Statement of Sen. Richard S. Schweiker). See also S. Rep. No. 743, reprinted in 1972 *U.S. Code Cong. & Admin. News* 2313, 2320-21. In *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 21 (1976), this Court held that the definition of "total disability" currently in use was not "unconstitutionally arbitrary and irrational."

Probability of Error

Contrary to petitioners' assertions, the probability of error if claimants are not represented by counsel is very high, a conclusion justified by common sense as well as empirical observation.

The black lung program is much more inhospitable to claimants than the veterans disability system considered by this Court in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985).[7] Even Before the 1981

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[7] The black lung system is also more adversarial, and less likely to result in claimant awards, than the social security

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amendments to the black lung act significantly restricted eligibility for benefits, the approval rate for new claims had fallen to 10% or less. Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W.Va.L.Rev. 677, 695 (1983). Following the 1981 amendments, the approval rate was roughly halved, and now stands at approximately 5%. Brief for the Federal Petitioner at 34; *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 88 and n. 15 (W.Va. 1988) (5.8%). *See also Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 100th Cong., 2d Sess. 67 (1988) (Statement of Cong. Robert E. Wise, Jr.) (citing 4.6% approval rate); *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcommittee on Labor Standards of the House Committee on Education and Labor,* 99th Cong., 1st Sess. 25 (1985) (citing 4% approval rate) (Statement of Donald Redman, President, United Mine Workers, District 5, Belle Vernon, Pa.). By contrast, half of all VA claims are approved. *Walters,* 473 U.S. at 309, 327.

Veterans enjoy the services of various veterans organizations which provide competent assistance, free of charge, to anyone who desires their help in obtaining disability benefits. *Walters v. National Association of*

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disability program challenged in *Randolph v. United States,* 274 F.Supp. 200 (M.D. N.C. 1967) (per curiam), *aff'd per curiam,* 389 U.S. 570 (1968). *See generally Mathews v. Eldridge,* 424 U.S. 319, 339 (1976); Popkin, *The Effect of Representation in Nonadversary Proceedings – A Study of Three Disability Programs,* 62 Cornell L. Rev. 989, 997-1002 (1977).

Radiation Survivors, 473 U.S. at 311-12 & n. 4 (1985).[8] During the brief 20-year history of the Black Lung Act, no comparable infrastructure has arisen to assist black lung claimants.[9]

Once a veteran files a claim, there are few deadlines to meet, and they tend to be quite liberal. For example, if

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[8] The Veterans Administration not only recognizes the right of these organizations to represent veterans, but provides office space for them free of charge, *Stearns v. VFW*, 394 F.Supp. 138, 145 (D.D.C. 1975), *aff'd without opinion*, 527 F.2d 1387 (D.C. Cir. 1976); 38 U.S.C. § 3402; Popkin, *The Effect of Representation in Nonadversary Proceedings – A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1028 (1977), an arrangement which tends to foster and support a close working relationship. *See* Popkin, *supra*; Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stanford L.Rev. 905, 918-19 (1975).

[9] Although the United Mine Workers of America (UMWA) has represented many claimants in the past, economic considerations have forced it to curtail this service. As of April, 1988, the UMWA was only handling black lung claims for "dues paying members," a restriction which excluded people who had retired as "a mine foreman, a federal inspector or a state mine inspector." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 75 (1988) (Remark by Harold Hayden, Representative, UMWA District 29). "District 31, one of three districts serving West Virginia, has ceased such representation due to lack of money." *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 92 n. 30 (W.Va. 1988) citing Brief of Amicus Curiae, Jane Moran, attached letter of January 26, 1987 from Eugene Claypole, Jane Darcus and James Sluser of UMWA. *See also Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 75-76 (1988) (Testimony of Sam Pratt, compensation counselor, UMW, District 17).

a veteran is dissatisfied with the ruling of the rating board, he can file a notice of disagreement at any time within one year from the date of mailing of notification of the initial review and determination. *Walters*, 473 U.S. at 311; 38 CFR §§ 19.129, 19.124.

At several stages of black lung litigation, however, there are fairly short deadlines which a claimant may have to meet to preserve his claim. *See, e.g.*, 20 CFR § 725.409(b) (response to deputy commissioner's notice of denial by reason of abandonment) (30 days); 20 CFR § 725.410(c) (response to deputy commissioner's initial finding of non-eligibility) (60 days); 20 CFR § 725.419 (request for hearing or revision of deputy commissioner's proposed decision and order must be made within thirty (30) days of issuance); 20 CFR § 725.479 (request for reconsideration of decision by ALJ must be made within thirty (30) days); 20 CFR §§ 725.481, 802.205(1), (appeal to Benefits Review Board [BRB] from decision of ALJ) (30 days); 20 CFR § 802.205(b) (cross-appeal to BRB from decision of ALJ) (14 days); 20 CFR § 725.482 (appeal from decision of BRB to Circuit Court) (60 days). *See generally* 20 CFR § 725.409(a)(3) (a claim may be denied by reason of abandonment when a claimant fails to pursue his claim with reasonable diligence); 20 CFR § 802.205(c) ("Any untimely appeal will be summarily dismissed by the [Benefits Review] Board for lack of jurisdiction.").

Black lung claimants are usually elderly,[10] unemployed,[11] and sick,[12] with little schooling[13] and relatively

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[10] According to the Department of Labor's 1983 report to Congress, the miner and widow beneficiaries in its survey were "predominately elderly, with a mean age of 70." U.S. Department of Labor, Employment Standards Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983) [DOL Sample Survey]. *See also Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong. 1st Sess. 115 (1985) [Investigation of the Backlog] (Statement of James DeMarce) ("the typical incoming claim is from someone whose age is somewhere between the midfifties and midsixties").

[11] In 1982, one in twenty miners and widow beneficiaries (5.5%) were employed either full time or part time . . .

> Of the miners living with spouses, 9% had wives who worked sometime during 1982. About 3% of the miner beneficiaries worked for pay at some time since receiving black lung benefits. . . .

DOL Sample Survey at 15. *See also Investigation of the Backlog* at 115 (Statement of James DeMarce) (people typically apply for black lung benefits when "they become seriously ill, and are no longer able to work or they may experience a prolonged layoff in the industry and tend to file for benefits at that time; or perhaps most commonly of all, when they retire they will file a claim for benefits").

[12] As this Court noted in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976), black lung disease is an irreversible, progressive illness for which there is no therapy. It "affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment." *Id.* at 6. *See also Mullins Coal Co. v. Director, OWCP,* 98 L.E.2d 450, 457 (1987).

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modest financial resources. See *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. 131 (1985) (Statement of John T. Jarvis) ("the average black lung recipient is not a wealthy person. The income to the household in general is usually less than $10,000.00"). Sadly, many miners "use up all of their personal finances for treatment of their illness" prior to receiving black lung benefits. *Delays in Processing and Adjudicating Black Lung Claims: Hearing before a Subcomm. of the House Comm. on Government Operations,* 99th

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In 1982, only 5.5% of miners and widow beneficiaries were employed either full or part time. DOL Sample Survey at 15. "Of those who were not employed during 1982, 72% of the miners and 60% of the widow beneficiaries reported 'ill or disabled' as the main reason for not working in 1982." *Id.*

The general ill health of black lung beneficiaries should come as no surprise, given their advanced age, and the fact that benefits are only available upon a showing of death or total disability due to pneumoconiosis. *See* 30 U.S.C. § 901(a); 20 CFR §§ 718.1, 725.1, 725.201.

[13] In the 1983 DOL survey,

> The typical miner received little formal education; only one in ten graduated from high school. In fact, three-fourths of these miners did not even attend high school. Widow beneficiaries tended to have slightly more education than miner beneficiaries, with 18% being high school graduates. A few of the widow beneficiaries (4%) attended college.

U.S. Department of Labor, Employment Standards Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983).

Cong., 1st Sess. 10-11 (1985).[14] These disabilities seriously impair their ability to represent themselves in proceedings which are often "viciously adversarial." *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 92 (W.Va. 1988), citing Brief of Amicus Curiae, Jane Moran, affidavit of Robert Cohen at 8-9, affidavit of Frederick Muth at 5-6.[15] *See Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 88 (1988) (Statement of Vincent Carroll, Virginia Black Lung Association) (miners "lack the financial resources necessary to have even a slim possibility of success").

Under 20 CFR § 725.360, responsible coal mine operators and their insurance carriers are parties to black lung

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[14] "Indeed, quite a few miners have died before benefits are awarded forcing their survivors to initiate and process their claims all over again." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 99th Cong., 1st Sess. 2 (1985) (Remark by Cong. Austin J. Murphey).

[15] It is interesting to note that the corresponding demographic characteristics of the population of veterans are markedly different from those of black lung claimants. For example, even though a large number of surviving veterans served during World War II, the majority of all veterans with compensable disability claims are under 65 years of age. Veterans Administration, *Selected Compensation & Pension Data by State of Residence, Fiscal Year 1987*, page 3. "With a 94-percent participation rate, Vietnam era veterans [are] as likely as their non-veteran peers to be in the labor force." Cohaney, *Labor Force Status of Vietnam-Era Veterans* 13 (Feb. 1987).

proceedings, and needless to say, they have a strong financial interest in opposing claims. "The actuarial value of a 1982 claim by a living miner with a spouse is nearly $150,000.00." Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va.L.Rev. 677, 686 (1983), citing actuarial chart in Black Lung Benefits Act Annual Report, U.S. Department of Labor 33 (Jan. 1981). In addition to disability benefits, responsible operators are liable for a claimant's medical expense, 30 U.S.C. § 932(a), attorney fees, 33 U.S.C. § 928(a), 20 CFR § 725.367, and interest. *Clinchfield Coal Co. v. Cox*, 611 F.2d 47 (4th Cir. 1979); 20 CFR § 725.608(a).

Given the value of a successful black lung claim, it should come as no surprise "[t]hat the responsible operator feels . . . he can well afford . . . to spend $5,000 to $10,000 to fight a non-paid attorney." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 22 (1985) (Statement of Martin Sheinman, Esquire).

The presence of parties with interests antagonistic to those of claimants results in a markedly adversarial system.[16] More than ninety percent (90%) of the claims

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[16] *See* Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W.Va. 763, 764 (1981) (With the transfer of authority from the Department of Human Services to the Department of Labor, Black Lung "claims adjudication procedures have changed dramatically in that what formerly was a non-adversarial action by a claimant against the Federal Disability Insurance Fund, has been transformed into a full adversarial proceeding involving private operator liability.") (footnote omitted)

approved at the deputy commissioner level will be challenged by coal mine operators. *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 92 n. 27 (W.Va. 1988). *See also Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 109 (1985) (Statement of James Sluser, Compensation Director, District 31, UMWA) ("I know of no responsible operator that has agreed to pay a claim without going through administrative law judge procedures"); *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 17 (1985) (Statement of Sen. John D. Rockefeller IV) ("the companies charged with the responsibility for providing the benefits to those miners who do have their claims originally approved almost always appeal the local decision in order to try to contest their liability."). This is a far cry from VA proceedings, in which veterans encounter no "opponent" other than a government agency which is required by law to assist them in pursuing their claims. *See Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985).[17]

Even at the deputy commissioner level, which is intended to be fairly informal in operation, black lung claimants can benefit greatly from the assistance of

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[17] In *Walters*, the Court relied heavily on the non-adversarial nature of VA proceedings in upholding a $10.00 limit on attorney fees, warning that "counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding. . . ." 473 U.S. at 333.

counsel in meeting their burden of proof.[18] The outcome of disability proceedings is often determined by the operation of various legal presumptions which the average claimant is unlikely to know about or understand without professional advice.[19] Attorneys can also play an important role in gathering and interpreting evidence, and presenting the claimant's case. *See generally* Selinger, *What Are Lawyers Good For?: The Radiation Survivors Case, Non-Adversarial Procedures, and Lay Advocates*, 13 Journal of the Legal Profession 123 (1988).

"The typical black lung case presents issues of law; issues of fact; medical issues; and issues which are a combination of law, fact, and medicine." Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W.Va.L.Rev. 763, 764 (1981). This Court has frequently acknowledged the value of counsel in dealing with factual, as well as legal, issues. *See In re Gault*, 387 U.S. 1, 36 (1967) ("The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into

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[18] "The initial nationwide approval rate for qualifications for black lung benefits [is] only about 2.8 percent of all claims filed." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 73 (1988) (Statement of Harold Hayden, UMWA Representative, District 29).

[19] In fact, many black lung "claimants who are not accustomed to legal or administrative proceedings do not really understand the significance of their bearing the burden of proof." *Black Lung Benefits: Hearing Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 92nd Cong., 1st Sess. 78 (1971) (Remarks by Clara Cody and James Haviland, black lung representatives).

the facts, to insist upon regularity of the proceedings, . . . ").

Part of the complexity of black lung practice stems from the fact that the "program has been developed through several statutory enactments [so that] different rules govern claims filed during different periods of time." *Mullins Coal Co. v. Director, OWCP*, 98 L.Ed.2d 450, 457 (1987) (footnote omitted). Consequently, as the lower court observed:

> . . . the history of black lung legislation demonstrates that even the *filing* of a claim for benefits is complex. It often requires a lawyer to determine which benefit structure applies to a particular claim.

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82, 88 (W.Va. 1988) (emphasis in original). The fact that the Code of Federal Regulations currently devotes approximately 155 pages to black lung benefits forcefully demonstrates the complexity of this entitlement program. *See generally* Falk, *Counseling the Coal Miner Suffering From Respiratory Disease*, 83 W.Va.L.Rev. 833 (1981).

Although the deputy commissioner is required to notify an unsuccessful claimant, in writing, "[i]f the evidence submitted does not support an initial finding of eligibility," and to "specify the reasons why the claim cannot be approved," 20 CFR § 725.410(c), many black lung claimants in Appalachia have "limited education and experience in dealing with government," and do not understand why their claims have been denied. *Black Lung Benefits* at 78 (Statement of Clara Cody and James Haviland, black lung representatives).

As claims progress beyond the deputy commissioner level, proceedings become increasingly formal and legalistic. At the Administrative Law Judge [ALJ] level, parties may cross-examine witnesses, 20 CFR § 725.457, take testimony through depositions and interrogatories, 20 CFR § 725.458, make oral arguments and file briefs.[20] 20 CFR § 725.459.[21] The advantage of retaining counsel in such proceedings is obvious. *See Scanlan v. Secretary of HEW*, 428 F.Supp. 313 (E.D. Pa. 1976) (proper interpretation of medical evidence and proper presentation of case necessitated presence of counsel); *Lincovich v. Secretary of HEW*, 403 F.Supp. 1307, 1313 (E.D. Pa. 1975) (unfavorable ruling reversed after claimant obtained counsel).

It is difficult to imagine how the average black lung claimant, with only a grade-school education, could effectively depose a medical or vocational expert retained by his adversary. *See* Goldhammer, *Legal Fees in Nonbusiness Administrative Claims*, 26 Hastings L.J. 1127, 1131-32 (1975). Moreover, "the claimant who does not have a lawyer runs a great risk in trying to answer . . . interrogatories himself, because if he gives inaccurate information or inappropriate information in response to a particular question, that could well come back to haunt

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[20] ALJ decisions are appealable to the Benefits Review Board [BRB], 20 CFR § 725.481, a body whose "functions . . . are quasi-judicial in nature." 20 CFR § 801.103. BRB decisions, in turn, are subject to judicial review by the circuit courts. 20 CFR §§ 725.482, 802.410. There are no provisions for judicial review in the VA disability system.

[21] As the Department of Labor observes in its brief, "proceedings before an ALJ take place in a more adversarial, trial-type setting" than hearings at the deputy commissioner level. Brief for the Federal Petitioner at 37.

him at some further phase in the process." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards on the House Comm. on Education and Labor,* 100th Cong., 2d Sess. 77-78 (1988) (Remark by Cong. Rick Boucher). *See also Id.* at 77 (Remark by Sam Pratt, compensation counselor, UMWA, District 17) ("the interrogatories alone are so confusing to the claimants").

In black lung proceedings, "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of R. R. Trainmen v. Virginia,* 377 U.S. 1, 7 (1964).[22] According to statistics provided by the Department of Labor, in ALJ proceedings, claimants with attorneys prevail 29% of the time but, when claimants proceed *pro se,* they prevail only 11.6% of the time. *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 98 (W.Va. 1988). Thus, as the lower court noted, claimants with counsel "have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se.*" *Id.* at 97. In addition, the cases of *pro se* claimants "take longer to process." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 100th Cong., 2d Sess. 73 (1988) (Statement of Harold Hayden, UMWA Representative, District 29).

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[22] Of course, the ALJ, if he is to fulfill his duties as the neutral and impartial arbiter of an adversarial proceeding, cannot function as an advocate on behalf of the claimant. *Shapell v. Director, OWCP,* 7 BLR 1-304 (1984); *Belcher v. Beth-Elkhorn Corp.,* 6 BLR 1-1180 (1984). To suggest otherwise would

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These figures stand in sharp contrast to data concerning ultimate success rates before the Board of Veterans Appeals which indicates that veterans with counsel fare only slightly better than veterans represented by service organizations, or proceeding *pro se. Walters,* 473 U.S. at 327, 331.

This difference in success rates underscores the more difficult nature of black lung claims. As the Court observed in *Walters,* "complex" VA claims amount to only a "tiny fraction" of "the total cases pending." 473 U.S. at 330.[23] "[T]he great majority of [VA] claims involve simple questions of fact, or medical questions relating to the degree of claimant's disability; . . . [and] only the rare case turns on a question of law." *Id.* "The black lung claims process," on the other hand, "is procedurally, factually and legally complex." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 (W.Va. 1988). *See also Mullins Coal Co. v. Director, OWCP,* 98 L.Ed.2d 450, 457 (1987) ("some aspects of the black lung benefits program are rather complex").

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be reminiscent of arguments once made to justify the denial of counsel in criminal cases. *See Betts v. Brady,* 316 U.S. 455, 472 (1942).

[23] Cases in which a veteran asserts injury from exposure to agent orange or radiation account for only about 3 in 1,000 claims at the regional level and 2% of appeals to the BVA. 473 U.S. at 329. Furthermore, not "all such claims would be complex by any fair definition of that term: at least 25% of all agent orange cases and 30% of the radiation cases . . . are disposed of because the medical examination reveals no disability." *Id.*

The value of having legal representation at black lung proceedings is recognized by everyone who can afford to retain counsel. Responsible coal mine operators and their insurance carriers are uniformly represented in black lung proceedings by private attorneys whose fees are not regulated or reviewed by the Department of Labor, while the disability trust fund is represented by attorneys provided by the government.[24]

Unfortunately, the number of attorneys in West Virginia who will represent black lung claimants is small and dwindling. According to the affidavit of Grant Crandall, which was part of the record in the lower court, there are only about twelve (12) attorneys in West Virginia who regularly handle black lung claims. This is a remarkably small claimants' bar given the number of practicing attorneys in West Virginia (over 3,000) and the large number of black lung claims filed in that state (roughly 1/5 of the national total). Although the parties may dispute why this is so, one fact seems unmistakably clear – most attorneys in West Virginia are not willing to practice black lung law on a regular basis. *See Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House*

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[24] The widespread use of attorneys by those with the financial ability to retain them provides strong evidence of the perceived value of counsel in black lung proceedings. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.")

Comm. on Labor Standards, 100th Cong., 2d Sess. 76 (1988) (Testimony of Sam Pratt, compensation counselor, UMWA, District 17) (only two private attorneys handle black lung claims in District 17).

According to the Department of Labor, however, claimants are represented by attorneys in 92% of the cases decided at the ALJ level, which allegedly demonstrates that most people are able to retain counsel under the status quo. Assuming that this statistic is accurate, however, the petitioner's assessment of its significance seems unduly optimistic, because many *pro se* claimants never make it to the ALJ level, while others receive continuance after continuance because they are unable to retain counsel. Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W.Va.L.Rev. 665, 272 (1989).

In reality, attorneys willing to do black lung work are so scarce that "[i]t is not uncommon for particularly desperate individuals to offer . . . attorneys unauthorized bonuses as an inducement for accepting employment. . . . [a] fact . . . [which] would most certainly appear to be an indication of the desperation of many . . . potential clients." Respondents' Opposition to Petitions for Certiorari, A-25, Affidavit of Frederick K. Muth. The fact that ALJs find it necessary, "as a matter of practice," Brief for the Federal Petitioner at 37, to assist claimants in locating counsel also provides strong evidence that black lung counsel is not readily available.

The reason for this lack of enthusiasm is widely recognized in West Virginia – the present system of compensating attorneys for black lung claimants.

> . . . those lawyers who agree to handle black lung cases are having trouble being reimbursed by the Black Lung Office. The result is that in some cases we have fees that are backed up three or four years.
>
> What is the ultimate result? It is a deterrent and that means that capable lawyers will not be willing to handle the claimants' cases because they know they can never be paid for them.

Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 3 (1985) (Statement of Rep. Robert E. Wise, Jr.). *See also id.* at 103 (Statement of Roger D. Foreman, black lung attorney); *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 64, 66, 67-68 (Statement of Cong. Robert E. Wise, Jr.).

When the office of Congressman Boucher surveyed all of the lawyers in the 9th Congressional District of Virginia, his staff found only five attorneys who "were still willing to handle black lung cases, and three of those had never handled the cases before. . . ." *Id.* at 77 (Remark by Congressman Boucher).

The office of Congressman Wise made a similar effort to compile and maintain a list of black attorneys in the 3d Congressional District of West Virginia. *Id.* at 75. At least eight of ten people originally on that list have subsequently indicated that they no longer desire any black lung referrals. *Id.*

UMWA personnel have stated that there are similar shortages of private black lung counsel in UMWA Districts 17 and 29. *See Id.* (Remarks by Sam Pratt, compensation counselor, UMWA District 17 and Harold Hayden, representative, UMWA District 29).

In concluding that the current system of compensating counsel in black lung proceedings discouraged most attorneys in West Virginia from handling black lung claims, the Supreme Court of Appeals of West Virginia had the benefit, of government reports and congressional hearings cited in its opinion, the transcript from Mr. Triplett's disciplinary hearing (at which several attorneys testified concerning the operation of the black lung program in West Virginia), the amicus curiae brief filed by Jane Moran, Esquire (who has herself been actively involved in representing claimants in black lung proceedings), *affidavits submitted by five (5) attorneys who constitute approximately one-third (1/3) of the lawyers who regularly handle black lung claims in West Virginia at this time*, and various materials submitted by the Department of Labor to supplement the record.

This Court has long recognized that access to counsel is an important element of due process in both criminal and civil proceedings. In *Powell v. Alabama*, 287 U.S. 45, 68-9 (1932), the Court opined that:

> What, then does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

* * *

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, due process in the constitutional sense.

In criminal and civil proceedings which involve the deprivation of physical liberty, due process requires the appointment of counsel at state expense if a party is indigent and desires representation. *Lassiter v. Department of Social Services*, 452 U.S. 18, 25-27 (1981).

In cases which do not involve incarceration or some other form of restraint, although "private parties must ordinarily pay their own legal fees, they have an undeniable right to obtain counsel to ascertain their legal rights." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982). *Accord Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1117 (5th Cir. 1980).

Even in small claims court, where claims are modest and the procedures are deliberately informal, parties must have an opportunity to employ counsel at some stage of the proceedings such as a trial de novo on appeal. *Brooks v. Small Claims Court*, 8 Cal.3d 661, 105 Cal. Rptr. 785, 504 P.2d 1249 (1973) (in bank); *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959); *Simon v. Lieberman*, 193 Neb. 321, 226 N.W.2d 781 (1975); *Mendoza v. Small Claims Court*, 49 Cal.2d 668, 321 P.2d 9 (1958) (in bank); *Prudential Ins. Co. v. Small Claims Court*, 76 Cal.App.2d 379, 173 P.2d 38 (Cal. Dist. Ct. App. 1946).

The right to retain and employ counsel at one's own expense has also been recognized in a variety of administrative proceedings. *See Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (termination of welfare benefits); *Anderson v. Sheppard*, 856 F.2d 741, 747-48 (6th Cir. 1988) (EEOC hearing); *Mosley v. St. Louis SW Ry.*, 634 F.2d 942, 945-46 (5th Cir.) EEOC proceeding), *cert. denied*, 452 U.S. 906 (1981); *Rex Investigative & Patrol Agency, Inc.*, 329 F.Supp. 696, 699 (E.D. N.Y. 1971) (proceedings under Longshoreman's and Harbor Workers Act); *Brown v. Air Pollution Control Bd.*, 37 Ill.2d 450, 227 N.E.2d 754, 756 (1967).

Although there may be some administrative proceedings which are so simple, informal and non-adversarial in nature that due process does not require that a claimant be allowed to retain legal counsel if he so desires, black lung proceedings are not among them. It is fundamentally unfair to compel a claimant with little schooling and limited financial resources to thread his way through a Byzantine labyrinth of rules, regulations and statutes, and to confront, *pro se*, powerful adversaries employing skilled counsel. "[A]s long as the system remains adversarial between the worker or the widow on one side, armed only with their years of work and suffering, and the government and/or the coal and insurance companies who are concerned only with the cost and their balance sheets, it will never be fair to the worker." *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 100th Cong., 2d Sess. 89 (1989) (Statement of Vincent Carroll, Virginia Black Lung Association).

The requirements of procedural due process are not satisfied by a system which denies vast numbers of meritorious claims by preventing claimants from retaining counsel to represent their interests in complex, adversarial proceedings in which their well-heeled opponents may retain whole stables of legal talent if they so desire.

As Congressman Rick Boucher regretfully observed during the April, 1988 oversight hearing on the administration of the black lung program:

> I really wish this hearing were not necessary. That is, I wish the Black Lung Program were providing assistance to those in need in a timely and effective manner. But unfortunately, that is not the case. Hearings and the issuance of decisions are delayed today beyond reason. Attorneys are increasingly reluctant to accept black lung cases. As soon as claims are filed, the claimants are often besieged with interrogatories from the coal operators at a time when they do not have the legal help necessary to answer those questions.
>
> Worst of all, the black lung approval rate has dropped to only four percent of the claims that are filed. Medical experts agree that a fair approval rate, one that reflects the amount of the debilitating disease which actually exists among claimants is more on the order of 15 to 20 percent, so at least two-thirds of the deserving black lung claimants are being weeded out in a determination process that obviously is in need of repair.

Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 100th Cong., 2d Sess. 4 (1988).

CONCLUSION

Contrary to the assertions of the petitioners, the lower court did not fail to give proper deference to a duly enacted act of Congress, nor did it misunderstand or misapply the results and reasoning of *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985), nor did it lack factual support for its conclusions concerning the operation and effects of the Federal Black Lung Program in West Virginia. Consequently, the decision of the Supreme Court of Appeals of West Virginia should be affirmed.

Respectfully submitted,

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